



# COUNTY OF LOS ANGELES

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November 21, 2002

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TO: SUPERVISOR ZEV YAROSLAVSKY, Chairman  
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SUPERVISOR YVONNE BRATHWAITE BURKE  
SUPERVISOR DON KNABE  
SUPERVISOR MICHAEL D. ANTONOVICH

FROM: LLOYD W. PELLMAN  
County Counsel

RE: **Entertainment Industry Development Corporation--  
Recent Questions and Executive Committee Meeting this  
Friday, November 22, 2002**

Members of your Board recently contacted our office with questions concerning the Entertainment Industry Development Corporation of Southern California ("EIDC") and the next meeting of its Executive Committee, which convenes this Friday, November 22, 2002. This memorandum addresses those questions and supplements the two previous reports we provided to your Board on September 13, 2002, and September 26, 2002.

As we have mentioned in our previous reports to your Board, although we are pleased to provide your Board with this information, our office does not represent the EIDC or its board of directors, officers, or employees. Therefore, legal advice pertaining to your obligations as an EIDC director should properly be directed to the EIDC's general counsel, Ms. Donna Wells.

Letter From Cody Cluff Dated November 15, 2002 (Removal vs.  
Administrative Leave)

Some members of the Executive Committee have publicly stated that Cody Cluff, EIDC's president, should resign or take administrative leave during the District Attorney's investigation of the EIDC. In response to these statements, Mr. Cluff sent a letter dated November 15, 2002, to Frank Scherma, EIDC's Chair. We understand that some of you have received copies of the letter, and at least one press outlet has publically reported its contents. For your information, we have enclosed a copy of the letter.

In the letter, Mr. Cluff states that he will not resign his position or take any leave at this time. He adds that the EIDC bylaws do not give the Executive Committee the authority to remove him. He asserts that only the entire EIDC Board can remove him, by first introducing a motion at a regular meeting of the Board and then taking action on that motion at the next regular meeting of the Board.

Placing an officer on administrative leave is not the same as removing an officer from his or her position. Article 4.5 of EIDC bylaws describes the process by which EIDC can remove an officer.<sup>1</sup> We do not believe that article 4.5 of the bylaws applies to placing an officer on administrative leave.

Placing an officer on administrative leave is a temporary action that does not terminate the person's position within an organization. Accordingly, no provision of the bylaws precludes the Executive Committee from taking such an action if it so desires.

#### Who Can be Present During Closed Sessions?

The EIDC's meetings are subject to the Brown Act. When the Executive Committee meets in closed session, whom it can exclude depends on the nature of the item.

During a performance evaluation of an officer or employee of the EIDC, the Executive Committee can exclude everyone other than committee members, including the person being evaluated, his or her lawyer and the lawyer, or lawyers representing the EIDC (including the EIDC's general counsel).

If the Executive Committee is considering pending or threatened litigation, it can exclude everyone who is not a member of the Committee, except for the lawyer advising the Committee. For example, if the Executive Committee retained special counsel to advise it with respect to the pending or threatened litigation, the Committee could exclude the EIDC's general counsel and any other outside counsel retained by EIDC.

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<sup>1</sup> Article 4.5 provides the following: "Officers may be removed by a majority vote of the authorized Board. Voting on removal shall take place no sooner than during the next regular meeting following that at which a motion to remove an officer(s) was introduced."

### Method to Hire Outside and Special Counsel

If the EIDC Executive Committee desires to retain new or additional counsel to represent the EIDC, it should conduct a competitive procurement, in order to avoid violating the EIDC's contract with the City. The EIDC's contract with the City of Los Angeles includes a provision that obligates the EIDC to conduct a competitive procurement in the event EIDC desires to contract for services.<sup>2</sup>

### Continued Representation by Tom Brown and George Newhouse

At the early stages of the District Attorney's investigation of the EIDC, Tom Brown and George Newhouse both asserted that they were representing the EIDC as a corporation and not Mr. Cluff individually. Recently, we have heard conflicting accounts regarding a change in representation such that Mr. Brown is now only representing the interests of Mr. Cluff, and Mr. Newhouse is representing the interests of the EIDC.

This raises a question concerning whether Mr. Brown can represent Mr. Cluff, since he previously claimed to be representing the EIDC. There is the possibility of a conflict between the interests of the EIDC and Mr. Cluff that, if established, would obligate Mr. Brown to secure a waiver of conflict of interest from both the EIDC and Mr. Cluff.

Similarly, if George Newhouse no longer continued to represent the EIDC, he might not be able to represent Mr. Cluff individually without first securing a waiver of conflict from both the EIDC and Mr. Cluff.

### Advancing Legal Expenses of An Officer, Employee, or Director

In our September 26, 2002, memorandum to your Board, we more fully addressed the issue of advancing legal costs and fees of officers and directors of the EIDC. There are specific provisions in the California Corporations Code that identify the parameters by which the EIDC may pay for the legal fees incurred by its officers or directors. In addition, EIDC bylaws have specific provisions that address this same issue.

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<sup>2</sup> In order to comply with EIDC's contract with the City, the EIDC should have conducted a competitive procurement before retaining the services of criminal defense lawyers Tom Brown and George Newhouse. We do not know whether such a procurement occurred.

Section 5238(f) of the Corporations Code prescribes when a nonprofit public benefit corporation such as the EIDC can advance the legal fees incurred by one of its directors, officers or employees, referred to in the code as "agents." The code provides that a corporation may advance the expenses of an agent incurred in defending an action ". . . upon the receipt of an undertaking by or on behalf of the agent to repay such amount unless it shall be determined ultimately that the agent is entitled to be indemnified . . . ." Section 5238(h) of the Corporations Code limits the ability of a corporation to indemnify its agent or to advance expenses for its agent if the bylaws expressly prohibit such.

Article 5.12 of the EIDC bylaws follows the provisions of section 5238 of the Corporations Code, albeit with much less detail. The bylaws are silent, however, as to whether the EIDC can advance legal fees to its directors and officers. Because the bylaws do not specifically authorize or prohibit the advancing of legal expenses, it is unclear whether the EIDC can advance such expenses upon receipt of an undertaking as required by the code. It would be prudent for EIDC to consult with a lawyer well versed in this area of the law prior to advancing any legal fees.

If Mr. Cluff, in his individual capacity, desires to have the EIDC advance his legal fees, then he should approach the Executive Committee with such a request. If the EIDC has received legal advice that it may advance the legal fees and Mr. Cluff has provided the appropriate undertaking, then the EIDC can consider advancing the fees. During the deliberations, the Executive Committee could consider placing limits on the advance. For example, the Executive Committee could limit the advance not to exceed a certain amount of money. This would limit the exposure to the EIDC's budget while still allowing Mr. Cluff to retain the lawyer of his choice.

If Mr. Cluff is ultimately successful on the merits in defense of a proceeding, section 5238(d) of the Corporations Code provides that the corporation shall indemnify him against actual and reasonable expenses. If Mr. Cluff unsuccessfully defends against a proceeding, section 5238(e) provides that the corporation may indemnify him, but only if the "standard of conduct" is met, as described in the Corporations Code.<sup>3</sup>

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<sup>3</sup> Section 5238(b) specifies the "standard of conduct" as follows: the agent acted in good faith and in a manner reasonably believed to be in the corporation's best interests and, in the case of a criminal proceeding, had no reasonable cause to believe that the conduct was unlawful. One method to determine whether the "standard of conduct" is met is by a majority vote of a quorum of the directors who are not a party to the proceeding.

If you have any questions concerning these issues please contact me, Donovan Main at 974-1829, Roberta Fesler at 974-1861, or John Krattli at 974-1838.

LWP:JFK:dm

Enclosure

c: David E. Janssen  
Chief Administrative Officer

Violet Varona-Lukens, Executive Officer  
Board of Supervisors

INDUSTRY  
DEVELOPMENT  
CORPORATION

November 15, 2002

Mr. Frank Scherma  
@radical.media  
1630 12th St.  
Santa Monica, CA 90404

Dear Frank:

Recently, some members of our Board of Directors have suggested publicly in an article appearing in Los Angeles Times (Friday, November 8) that I resign or take administrative leave. Other members of our Board have said that such an action is unwarranted. I believe that it would be good for you to know why I will not be resigning or taking any type of leave at this time.

The public attention and scrutiny paid to me is uncomfortable. I do not like being subjected to such political and journalistic frenzy. However, I believe, as do many of you, that stepping down from EIDC at this time would be destabilizing, unfounded and rash. I intend to remain as President throughout the management review and fiscal audit in order to provide the selected firm with all the support needed to ensure a successful outcome. Furthermore, while I have the best staff a CEO could want, I intend to continue to direct and support all the programs of EIDC - including permit operations, community relations, facilities and production services, workforce and economic development activities.

On the legal front, the District Attorney continues his investigation. I am deeply troubled by the impact this investigation has had on my hard-working and loyal staff, colleagues, business associates and friends. However, this is still just an investigation. No charges have been filed. This investigation is based on a fundamental misconception that we are a governmental agency, which is wrong. Our status as a private 501(c) 4 corporation funded by private dollars has been confirmed by our in-house counsel, outside counsel, the City Attorney and the County Counsel.

The Executive Committee of our Board has put a process in place to address any concerns about the EIDC and make appropriate changes to our Board structure, bylaws, governance and financial controls. This type of review and possible restructure is common to any small business that has experienced a significant growth in staff and revenue in a short time. This office is working very hard to ensure that this effort is carried out effectively.

We received bids for the management and fiscal audit on Tuesday, November 12. These proposals will be reviewed by a stellar and independent panel of experts selected by Keith Comrie, the consultant chosen by the Executive Committee to carry out the process they put in place. This panel will interview three to five firms on Tuesday, November 19 and recommend one to the Executive Committee at their meeting on November 22. A key part of this process needs to be planning for the appointment of all Board members, officers, and directors, including the President, that ensures the industry and the community continue to be well served.

You should also be aware that under our bylaws the Executive Committee does not have the authority to remove any Director (including the President). That authority rests solely with a majority of the entire Board and requires two regular Board meetings, i.e., a motion to remove an officer may be introduced at a regular Board meeting with the voting to occur at the next regular Board meeting.

I am working with your Chair, Frank Schema, to schedule our annual Board meeting for sometime in January. (Most of our previous annual meetings were held in January). I look forward to seeing you at the meeting and hope that we will have significant recommendations to strengthen the corporation and continue its forward momentum.

I have been honored to serve as EIPC's founder, President and CEO for seven years. Nonetheless, I never intended to make this my life's work. I am an entrepreneur at heart and I hope to have many successful ventures in my future. However, I would be negligent in abandoning EIPC at this time. I look forward to working with all of you to continue our record of accomplishment in retaining and growing this \$30 billion economic engine in our region and to keeping these important jobs contributing to our nation's financial health.

As always, I welcome your calls.

Sincerely



Cody Cluff  
President